80-1788

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ALEXANDER L. STEVAS,
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NO.

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

DENNIS SCHOENDORF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals incorrectly apply the test enunciated in Rakas v. Illinois, 439 U.S. 128 (1978) as to legitimate expectation of privacy.

2. Did the Court of Appeals incorrectly hold that Schoendorf's custodial statements were admissible.

3. Did the Court of Appeals incorrectly decide the issue of foreign vs. interstate shipment in violation of the Fifth Amendment right to be tried on the indictment returned by the grand jury.

4. Adoption of Questions Presented in petition of Ronald Jacobs docketed March 19, 1981.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DENNIS SCHOENDORF,

Petitioner

-vs-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Dennis Schoendorf, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 22, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported, but appears in the Appendix hereto. The judgment of the United States District Court for the District of Connecticut appears in the Appendix hereto, and Suppression Ruling.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on October 22, 1980. A timely petition for rehearing was denied on February 25, 1981, and this petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDENT IV:

The right of the people to be se-

cure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION, AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §549:

. . .

Whoever, without authority, willfully removes, breaks, injures, or defaces any customs seal or other fastening or mark placed upon any vessel, vehicle, warehouse, or package containing merchandise or baggage in bond or in customs custody;

. . .

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. §659:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals,

or by fraud or deception obtains any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property;

. . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year,

or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

. . .

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made . . .

18 U.S.C. §2314:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or

taken by fraud;

. . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

Dennis Schoendorf was charged with Ronald Jacobs and others in a five-count indictment returned to the District of Connecticut on July 13, 1979. Schoendorf and Jacobs were charged in three of these counts with violations which occurred on March 22, 1979.

> Count One: Theft of an interstate shipment of veal and beef in excess of $100.00 (18 U.S.C. §§ 659 and 2).
>
> Count Two: Breaking and removing U.S. Customs Seals from two refrigerated trailers containing veal in customs custody (18 U.S.C. §§ 549 and 2).
>
> Count Three: Transportation across state lines of veal valued in excess of $5,000.00, knowing the same to have been stolen. (18 U.S.C.

§§ 2314 and 2)

Schoendorf and Jacobs were found guilty of these charges at a jury trial and Schoendorf sentenced to imprisonment for five years to be followed by a period of probation.

Prior to trial, Schoendorf and Jacobs moved to suppress the fruits of a warrantless search and seizure on March 31, 1979 of a Diamond Reo tractor and attached Fruehauf refrigerated trailer. They claimed lack of probable cause and exigent circumstances. The government claimed the presence of both probable cause and such circumstances. Although not raised by the government the District Court held that neither Schoendorf nor Jacobs had a legitimate expectation of privacy in this tractor/trailer. The issues of probable cause and exigent circumstances were never reached.

At trial, the government both

claimed and proved that Schoendorf owned, possessed and had custody and control of the Diamond Reo tractor, and that the Fruehauf trailer was the property and in possession and control of both Schoendorf and Jacobs. Over objection, the results of this warrantless search and seizure were admitted into evidence. (Evidence of a large quantity of frozen beef alleged in Count One to have been stolen.)

Prior to trial, Schoendorf also moved to suppress statements he made following his arrest to government agents without his counsel present, after exercising his right to remain silent in the presence of these agents and his counsel. This motion was denied following a hearing, at which time the Special Agent in charge of the F.B.I. investigation testified:

Q. You did ask him something

about vehicles, didn't you?

A. Yeah, we asked him, you know, "Do you have any vehicles other than," you know, "the blue Lincoln that was seized down there?"

He said, "Well, no, you know, because I'm partner in the used car lot, but, "he said, "about that blue Lincoln, when I'm going to get that thing back?"

I said, "Gee, you'll have to ask Special Agent Weinschenk. He's the one. He's a Customs agent."

And Special Agent Weinschenk said, "Well, we're going to keep it because it was seized as an instrumentality of a crime, as evidence, and we're going to hold it until disposition by the Court. Because it was -- you know, it was used to haul some meat down there in New Jersey."

And at that point Mr. Schoendorf said to me, if I remember correctly, he said, "The meat was never in that car." I think that's the quote we have written down.

And we naturally said, "Well, would you care to elaborate on that?"

And he smiled and said, "No. I'm not going to say anything further." (A 123,124.)

On March 23, 1979, the F.B.I.

learned that three refrigerated trailers each containing about 40,000 pounds of frozen meat in U.S. Customs bondage (two trailers containing veal and one containing beef) were missing the previous evening from a terminal at the U.S. Customs post at New Haven. A few days later, the three missing containers with the U.S. Customs Seals broken were found empty in Connecticut. On March 30, 1979 the F.B.I. located the veal in New Jersey and the blue Lincoln which they traced to Partners Garage, a repair garage just outside New Haven owned and operated by Schoendorf and Jacobs. At that time, the F.B.I. arrested Richard Suello and charged him in New Jersey with conspiracy in connection with federal violations concerning the veal. Over objection at trial, the government was permitted to elicit testimony from Suello (their chief witness) that he had pleaded guilty to this

charge of conspiracy in connection with this case. And in summation the government used Suello's plea of guilty to both corroborate his accomplice's testimony and to incriminate Schoendorf and Jacobs. Although conspiracy was not charged in the indictment, the case was permitted by the District Court to be tried as a joint venture case involving Schoendorf, Jacobs, Suello and others.

REASONS FOR GRANTING THE WRIT

I

IN UPHOLDING THE DISTRICT COURT, THE COURT OF APPEALS INCORRECTLY APPLIED THE TEST ENUNCIATED IN RAKAS V. ILLINOIS, 439 U.S. 128 (1978) AS TO THE LEGITIMACY OF SCHOENDORF'S EXPECTATION OF PRIVACY.

Following a pre-trail suppression hearing, the District Court found that Schoendorf and Jacobs exercised a considerable degree of control over the tractor/trailer. However, it did not find their expectations of privacy to be

legitimate because there was not sufficient credible evidence of ownership or legitimate possession. At the time of the seizure, the District Court found the tractor had no license plates, its serial number was not recorded with the Connecticut Department of Motor Vehicles, the trailer bore a license plate registered to a third party. There was no evidence that either the tractor or the trailer were stolen or that in any way the possession by either Schoendorf and Jacobs was not lawful. They had the keys, they drove them openly on public highways and maintained them at their place of business. Whatever doubt there may have been at the suppression hearing was removed at trial by the government, which, as a part of its case in chief, both claimed and proved that Schoendorf owned and possessed the tractor, that either Schoendorf or Jacobs owned the trailer

(probably together as part of their business) and, in any event, they both possessed the trailer. A government witness testified he sold the tractor to Schoendorf on December 13, 1978 and produced the bill of sale. Over defense objection the fruits of the search and seizure were admitted.

In summation, the government repeatedly claimed the tractor/trailer in which the beef was seized belonged to Schoendorf and Jacobs. Following summation, defendants moved for a mistrial or, in the alternative, to strike this evidence of the search and seizure and to instruct the jury to disregard it. Motion denied. The government should be estopped from making any claim that Schoendorf or Jacobs had no legitimate expectation of privacy in the tractor/trailer.

It is also important for this Court to clarify the reference in Rakas to the

"burglar in summer cabin." That example, as stated in Rakas, clearly assumes that the burglar's presence in the "summer cabin during the off season" was not lawful or legitimate. No such assumption is warranted here, and the courts below, in making such assumption, misapplied the Rakas test. Further, it is important for this Court to establish a rule to govern situations wherein Fourth Amendment protection is denied in a pre-trial suppression hearing based upon his failure to show a Rakas privacy interest, and then be faced at trial with the government's claim and proof that such interest did exist.

II

IN UPHOLDING THE DISTRICT COURT, THE COURT OF APPEALS INCORRECTLY HELD THAT SCHOENDORF'S CUSTODIAL STATEMENTS AFTER HIS COUNSEL HAD LEFT HIM WITH F.B.I. AGENTS FOR A FEW HOURS PENDING ARRAIGNMENT IN COURT WERE UNSOLICITED ANSWERS TO PERMISSIBLE PERSONAL

DATA QUESTIONS AND IN SO DOING VIOLATED THE EXPRESS COMMANDS OF THIS COURT IN MIRANDA V. ARIZONA, 384 U.S. 436 (1966).

On July 10, 1979, three days before indictment was returned herein, Schoendorf appeared at the F.B.I. offices in New Haven to be arrested and prosecuted. He appeared with counsel. Following his arrest and reading of his Miranda rights, Schoendorf clearly invoked his right to remain silent in the presence of F.B.I. and U.S. Customs agents and his counsel. His counsel secure, although mistakenly, in his belief that the government agents would not question his client, left Schoendorf with the agents for booking and delivery to the Court later that day where he would rejoin his client for arraignment. Once Schoendorf's counsel had left, he was fingerprinted and photographed. The two agents in charge of the case then took him into a

separate room and proceeded to question him. This questioning began with identification: his height, weight and hair color. It then proceeded to the subject of Schoendorf's address and then "Do you have any vehicles other than" you know, "the blue Lincoln that was seized down there?"

This question, particularly in the context of this case, which charged the movement and transportation of large quantities of goods in vehicles should not be condoned as necessary for identification of a defendant. Surely no lawyer would permit such questioning, nor even many defendants, if they realized at the time their answers would be used against them; nor should this Court permit such questioning of a defendant just after counsel has trusted his client to the integrity of government agents. The Court of Appeals stated that Schoen-

dorf's incriminating statement was just blurted out in response to permissible personal data questions.

The record does not support this legal characterization and it is important for this Court to reaffirm the Miranda proscriptions. The following sequence of questions and answers between these two experienced government agents and a custodial defendant following exercise of his Miranda rights and without his counsel present, followed in very natural order. This is not a case where the defendant's incriminating statement followed an innocuous questions about the weather or the baseball standings at the all-star break in July, nor is it a case of an accused's statement following a conversation between government agents as in Rhode Island v. Innis, __ U.S. __, 64 L.Ed.2d 297, 100 S.Ct. __ (1980). Schoendorf responded to these rhetorical

questions by governments agents to him. Schoendorf answered the question about vehicles other than the blue Lincoln in the negative, and included in his answer a request for information about the return of the blue Lincoln. This topic was clearly outside the scope of personal identification, as was the agent's question. But the F.B.I. agent pursued the topic about the blue Lincoln by referring Schoendorf's question about the blue Lincoln to his partner, the U.S. Customs Agent in charge of the U.S. Custom's aspect of the case, also present in this questioning of Schoendorf. Low-keyed and friendly, the F.B.I. agent encouraged further discussion with Schoendorf about this sensitive nonidentification topic.

> "Gee, you'll have to ask Special Agent Weinschenk. He's the one. He's the Customs Agent."

Without any further inquiry by

Schoendorf, Special Agent Weinschenk said:

> "Well, we're going to keep it because it was seized as an instrumentality of a crime, as evidence, and we're going to hold it until disposition by the Court. Because it was . . . you know, it was used to haul some meat down there in New Jersey."

This statement, suggesting a response, was now well beyond personal identification. It was in the form of subtle interrogation in which these agents are trained, and now, was in a form of an accusation. At no time, since exercising his right to remain silent and to be free of government questioning, had Schoendorf waived his rights. His counsel was no longer with him. Jacobs had been placed in a separate room, also for questioning by a separate team of government agents. Under the disguise of "personal data" Schoendorf had been tricked. He had

already admitted a relationship to the blue Lindoln on learning from these agents it had been seized in connection with this case. Now, in order to respond to the accusation about the use of the blue Lincoln in the crime, he stated:

> "The meat was never in that car."

There can be no doubt that these government agents were seeking incriminating information, as admitted by the F.B.I. agent in testifying about this interrogation.

> And we naturally said, "Well, would you care to elaborate on that?"

At this point, their purpose became clear even to Schoendorf, and he said

> "No, I am not going to say anything further."

Defendant's pre-trial motion to suppress his statements during this interrogation was denied, and at trial,

Schoendorf's statement that the meat was never in that car was admitted into evidence against him.

The rule in Miranda:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. 38 U.S. 436, 473, 474.

It is the interrogation which must cease, and such was not the case here, resulting in incriminating responses used as evidence at trial.

Further, this interrogation occurred just after the Schoendorf counsel had left his client with these agents pending arraignment later that day in court.

Regardless of a defendant's Fifth or Sixth Amendment rights, a very limited exception has been recognized which permits questions concern-

ing personal data. But where, as here, those questions can cause incriminating responses, the evidence elicited should be suppressed. This is a vital area of the law which needs clarification.

III

THE COURT OF APPEALS, IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL, MISAPPLIED THE LAW AS TO AN ESSENTIAL ELEMENT OF COUNT I OF THE INDICTMENT: THAT THE SHIPMENT OF MEAT WAS "MOVING AS, WAS A PART OF, AND CONSTITUTED AN INTERSTATE SHIPMENT FROM NEW JERSEY TO CONNECTICUT."

In fact and in law, the shipment of meat herein was under the custody of U.S. Customs at the time of the theft. It had not cleared the Port of New Haven. The shipment at the time of the alleged theft was not moving as or had become a part of an interstate shipment. It was still in foreign commerce. The holding of the Court of Appeals is contra to

U.S. v. Concepcion, 419 F.2d 1263 (2nd Cir. - 1970) and to decisions of this Court. Stirone v. U.S., 361 U.S. 212 (1960); Ex parte Bain, 121 U.S. 1 (1887).

In U.S. v. Concepcion, 419 F.2d 1263 (2nd Cir. 1970) the defendant was convicted of theft of a foreign shipment. The shipment consisted of photographic equipment shipped from Japan to a consignee in Garden City, New York. It was unloaded from a ship in Brooklyn, N.Y. on April 11, 1966 where it remained until April 19, 1966 when it was picked up by a trucking company engaged by an agent of Nippon, the consignee, for delivery to a bonded customs warehouse in Manhattan. The truck was hijacked in Brooklyn after leaving the Brooklyn pier.

The Court of Appeals in rejecting Concepcion's claim that the shipment was in intrastate commerce, held the ship-

ment at the time of the theft to be in foreign commerce. 419 F.2d 1263, 1264.

> It is clear from the relevant customs statutes regarding bonded carriers and bonded warehouses that, as a matter of law, the shipment remained under the custody of the customs officers until it was cleared for release from the bonded customs warehouse, and at the very least, up to the point of such release, the goods are in foreign commerce.

The plain fact is that the defendants here were charged with and convicted of a theft from an interstate shipment. The proof in this case as in Concepcion, is that of a foreign shipment. The two are mutually exclusive. It is either one or the other. The nature of the shipment, foreign or interstate, either of which can be the basis of an indictment and conviction under 18 U.S.C. § 659, is a critical element of the crime. The District Court so

charged in Schoendorf's case. The conviction here under Count I of the indictment was for theft from interstate rather than foreign commerce. However, there is no evidence upon which a jury could find an interstate shipment. In order for the conviction on Count I herein to be upheld, it would be necessary to find Schoendorf guilty of a crime not charged in the indictment. Such would be a violation of defendant's Fifth Amendment right to be tried only on charges presented in an indictment returned by a grand jury. Stirone v. U.S., 361 U.S. 212 (1960). Ex parte Bain, 121 U.S. 1 (1887).

Foreign commerce is not included within interstate commerce. It is separate and distinct. Stirone v. U.S., supra, is controlling, because in order to convict Schoendorf, it would be necessary to substitute foreign ship-

ment which was not charged or included within the charge of interstate shipment. In Stirone, the defendant was charged with a Hobbs Act violation involving interference with shipments of sand from outside Pennsylvania to a concrete plant inside Pennsylvania. At trial the evidence of interstate commerce was that of possible future shipments from inside Pennsylvania to outside Pennsylvania. The court, in reversing the conviction held:

> Here, as the trial court charged the jury, there are two essential elements of a Hobbs Act crime: Interference with interstate commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment

> drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. (emphasis added) 361 U.S. 212, 218.

During the trial herein, no amendment to the indictment was requested, nor could be granted. Only a grand jury can decide whether an indictment charges foreign as opposed to interstate commerce. Ex parte Bain. supra.

That no objection or consideration to this issue was made or given in the trial court, does not alter the result, because an indictment returned by a grand jury cannot be amended by a court or lawyer. Therefore the absence of an objection in the trial court cannot result in the amendment to the indictment.

The Court of Appeals did not

reach the Ex parte Bain or Stirone issues. It incorrectly stated that the evidence of interstate shipment was strong here, and is stronger than in U.S. v. Wora, 246 F.2d 283 (2nd Cir. - 1957), cited to it by the government. The Court of Appeals also stated that only foreign shipment was proven in Wora.

The Court of Appeals mistated Wora. The goods in Wora had originated in Canada and were part of a shipment destined for Canton, Ohio. These goods entered New York State at Buffalo and were stolen after transfer to another truck and moved to Hamburg, New York en route to Canton, Ohio. There was no evidence that the goods in Wora were in customs bondage at the time of the theft, and there was evidence that the goods were stolen while en route to Canton, Ohio from New York State. Therefore,

in Wora, the interstate trip of these particular goods destined for Canton, Ohio had commenced, at the time of the theft, even though no state line had, as yet, been crossed. The Court of Appeals in Wora stated:

> Moreover, there was ample evidence that the goods were stolen while moving as a part of interstate commerce, and the judge charged that "the government has the burden of showing...that the nickel was stolen from the shipment of freight which was then in the process of moving in interstate commerce. (Emphasis by the Court.) 246, F.2d 283, 285.

Wora is a clear case of interstate shipment rather than foreign shipment at the time of the theft. Such goods had passed entry into New York State en route to Ohio and there was no evidence of their being in customs bondage at the time of the theft, as was the case in U.S. v. Concepcion, supra. The Court of Appeals is also wrong if

it relied, as it appears it did, on the movement of the veal from Connecticut to New Jersey after the theft. Petitioner's claim here pertains just to the theft count of the indictment which is Count I, not Count III. Such goods had not as yet entered into the commerce of the various states, as their foreign journey had not ended. There is no authority of which this counsel is aware to the contrary, and certainly Wora is not such authority. In its present posture, the Court of Appeals holding herein is contrary to Ex parte Bain, U.S. v. Stirone and U.S. v. Concepcion, supra.

IV

ADOPTION OF REASONS OF PETITIONER RONALD JACOBS FOR GRANTING THIS PETITION.

Dennis Schoendorf adopts as his own the reasons for granting the writ

in the petition of Ronald Jacobs docketed in this Court on March 19, 1981.

CONCLUSION

This petition raises issues important for clarification and resolution in the administration of justice. The rulings by the Court of Appeals here effect significant issues in the prosecution and defense of criminal cases and, as decided herein against Schoendorf, are not harmless error. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted:
THE PETITIONER

BY: FREDERICK W. DANFORTH, JR.
A Member of the Bar
of the Supreme Court
of the United States

DATED: April 24, 1981

NO.

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

DENNIS SCHOENDORF,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX

APPENDIX A

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-second day of October, one thousand nine hundred and eighty.

Present:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE JON . NEWMAN,

Circuit Judges.

HONORABLE EDMUND PORT,

District Judge,

sitting by designation.

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

-v.- 80-1219

80-1237

RONALD JACOBS and

DENNIS SCHOENDORF,

Appellants.

Appeals from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and the same hereby are affirmed.

Appellants Jacobs and Schoendorf were indicted on three counts of a five-count indictment. They were charged with Theft from Interstate Shipment, 18 U.S.C. § 659 (1976); Breaking Customs Seals, 18 U.S.C. § 549 (1976); and Interstate Transportation of Stolen Property 18 U.S.C. § 2314 (1976). They also were charged with aiding and abetting these crimes. 18 U.S.C. § 2 (1976).

On March 11, 1980, after a hearing,

appellants' motions to suppress physical evidence and statements were denied.

Their jury trial commenced on April 8, 1980 and ended on April 23. The jury returned guilty verdicts as to both defendants on each of the three counts. This appeal followed.

Appellants urge chiefly seven grounds for reversal of the convictions: first, that certain remarks of the prosecutor deprived them of a fair trial; second, that the district court erred in finding that appellants lacked standing to move to suppress the results of the search of a Freuhauf trailer that contained stolen meat; third, that testimony elicited by the government from its witness as to his conviction in a related matter required an instruction from the court which was not given; fourth, that it was an abuse of discretion for the court not to turn over to appellants the

entire government file on its witness Proto; fifth, that it was improper for the court to refuse to suppress statements made by appellant Schoendorf before and immediately after his arrest; sixth, that the court erred in admitting in evidence documentary material which tended circumstantially to connect appellants with recovered stolen meat; and seventh, that the court erred in denying the motion for judgment of acquittal because the government failed to prove the interstate commerce element of the offense. We hold that each of appellants' claims is without merit.

The first claim is that the prosecutor engaged in prejudicial conduct by referring to the appellants as "crooks" in his rebuttal summation. The remark should not have been made, and it would have been preferable for the district judge promptly to advise the jury of its

impropriety, but we are satisfied that any resulting prejudice was too slight to warrant a reversal. See United States v. Benter, 457 F.2d 1174, 1178 (2 Cir. 1972).

The district court did not err in finding that appellants lacked standing to challenge the search of the Freuhauf trailer. Neither appellant established the sort of possessory interest which this Court in some contexts has held sufficient. United States v. Ochs, 595 F.2d 1247 (2 Cir.), cert. denied, 444 U.S. 955 (1979). The court carefully and correctly applied the test enunciated in Rakas v. Illinois, 439 U.S. 128 (1978), where the Supreme Court held that the "capacity to claim the protection of the Fourth Amendment depends . . . . upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the in-

vaded place." 439 U.S. at 143. On the facts here, where neither appellant was present at the time of the search, the tractor had no registration plates and the trailer was registered to a Pennsylvanian not involved in the investigation or trial, and all evidence of appellants' ownership was based on the questionable testimony of witness Suello, we hold that the court did not err in finding that appellants had not sustained their burden of establishing standing by the evidence offered at the hearing on the motion to suppress. Appellants further contend that evidence presented at trial established their ownership of the trailer. Without reaching the government's contention that evidence presented at trial may not be considered on the issue of standing when the evidence was available at the hearing on the motion to suppress, we hold that the trial testimony did not

add in any significant degree to the evidence considered and found insufficient at the suppression hearing.

As for appellants' claim that the government's disclosure of witness Suello's guilty plea in a related matter had a spillover effect, we hold that the government was entirely within its rights and indeed was required to make such disclosure.

We further hold that the court did not err in refusing, after an in camera inspection, to turn over to the defense as Brady-Jencks Act material the entire government file on witness Proto. Defense counsel offered little beyond conclusory statements to support their claim that the file contained material which might impeach the witness so as to affect the outcome of the trial, in accordance with the standard of this Circuit. Stassi, supra, 544 F.2d at 584;

United States v. DiFrancesco, 604 F.2d 769 (2 Cir. 1979), cert. granted, 444 U.S. 1070 (1980). We decline to disturb the trial judge's determination that the material in the file would not have affected the outcome.

We also hold that the court was correct in refusing to suppress the statement by appellant Schoendorf, first to a federal agent on the street near his place of business, and second after his arrest and after Miranda warnings had been given. The first statement squares with the holding of Beckwith v. United States, 425 U.S. 341 (1976), where a statement by the target of an investigation -- in a noncustodial context -- was held admissible despite the failure of the agent to give Miranda warnings. On the facts here, the colloguy was almost friendly and certainly noncustodial and was thus outside the scope of Miranda.

The second set of statements were unsolicited answers to permissible personal data questions. Unlike the situation in Rhode Island v. Innis, 48 U.S.L.W. 4506 (May 12, 1980), where the Supreme Court approved the admission of an answer to a suggestive conversation among policemen in the presence of the accused, here there was no leading conversation, no devious questions, and no attempt to evade Miranda safequards. The instant case is a stronger one for the government than Innis. We hold that the blurted answers were properly admitted in evidence.

With respect to the claim, that the court erred in admitting circumstantial documentary evidence, the rulings of the court were not arbitrary or capricious, with the standard enunciated in United States v. Robinson, 560 F.2d 507 (2 Cir.) (en banc), cert. denied, 435 U.S. 905

(1978). We hold that admission of this disputed evidence was a proper exercise of the court's discretion.

Finally, we hold that the court did not err in denying the motion for judgment of acquittal. Appellants misstate the case against them when they argue that the government proved only foreign shipment and not interstate shipment. The stolen beef and veal was taken from New Jersey, through New York, to Connecticut, and, in the case of the veal, back through New York to New Jersey. The evidence of actual interstate shipment is strong. The instant case is a stronger one than United State v. Wora, 246 F.2d 283 (2 Cir. 1957), where the conviction was affirmed even though only foreign shipment was proven. Appellants here were on notice of the charges against them. Those charges were proven.

WILLIAM H. TIMBERS/s/
UNITED STATES CIRCUIT JUDGE

JON O. NEWMAN/s/
UNITED STATES CIRCUIT JUDGE

EDMUND PORT/s/
UNITED STATES DISTRICT JUDGE,
Sitting by Designation.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of February, one thousand nine hundred and eighty-one.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS SCHOENDORF, RONALD JACOBS, WALTER LAFFIN and JOHN CUNNINGHAM,

Defendants,

No.80-1219

80-1237

RONALD JACOBS,

DENNIS SCHOENDORF,

Defendants-Appellants.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Dennis Schoendorf,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro /s/
A. Daniel Fusaro,
Clerk

APPENDIX C

United States District Court for

DISTRICT OF CONNECTICUT

United States of America vs.

DENNIS SCHOENDORF

Docket No. CRIMINAL B-79-26

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date

MAY 23, 1980

XX WITH COUNSEL

FREDERICK W. DANFORTH, JR., ESQ.

There being a verdict of XX GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of Title 18, United States Code, Sections 659 and 2; 549 and 2; and 2314 and 2 (theft from interstate commerce; broke custom seals and interstate transportation of stolen goods)

as charged in Counts One, Two and Three

of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on Count One.

It is ORDERED AND ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count Two. The sentence on Counts One and Two are to run concurrently.

It is FURTHER ORDERED AND ADJUDGED that imposition of sentence is suspended on

Count Three and the defendant is placed on probation for a period of five (5) years. Said period of probation is to commence upon his release from custody on Counts One and Two.

XX U.S. District Judge

T.F. Gilroy Daly /s/
T.F. Gilroy Daly

5/28/80

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States of America:		
-vs-	:	Criminal B-79-26
Ronald Jacobs and Dennis Schoendorf:		

RULING ON MOTION TO SUPPRESS

Defendants have moved to suppress the fruits of a search on March 31, 1979 in West Haven, Connecticut of a Freuhauf trailer bearing Pennsylvania license TD 46152 and attached to a black Diamond Reo Tractor. The federal agents who conducted the search and seizure found inside the trailer a shipment of beef that had been stolen a week earlier in New Haven. Testimony at the evidentiary hearing on February 15 and March 11, 1980 established the pertinent facts as follows.

At approximately 3:00 or 3:30

A.M. on March 31, 1979, FBI Special Agent Michael Genova received a telephone call from an informant who previously had supplied information leading to at least ten arrests and six convictions. The informant provided Agent Genova with the description and location of the trailer at issue here, and stated that it contained a portion of the stolen beef that was the subject of Agent Genova's investigation and the indictment in this case. The informant said also that the beef would be moved within two hours.

Agent Genova immediately related this information to FBI Special Agent George Phillips, who also was investigating the theft. Agent Phillips proceeded to the named location, arriving at about 4:00 A.M. at a lot across the street from the Ramada Inn in West Haven, where he discovered a tractor and refrig-

erated trailer perfectly matching the description given by the informant, and parked in a wooded corner of the lot. Six other agents met Phillips there. The tractor bore no license plate. The National Crime Information Center computer indicated no stolen report on either the identification number of the tractor or the license number of the trailer, which was registed [sic.] to Michael Erdley of Lewisburg, Pennsylvania. The refrigeration unit on the trailer was running and the trailer was locked with a padlock. The window on the driver's side of the tractor was down, the door was unlocked, and wires hanging under the dash suggested to Agent Phillips that the ignition had been tampered with.

After observing the tractor-trailer and the surrounding area for approximately one hour, Agent Phillips described the situation over the tele-

phone to Assistant United States Attorney Peter Clark, who advised him to open the trailer. Phillips did so with bolt cutters and found inside boxes matching the description he had received from United States Customs officials of the boxes containing the stolen beef. He removed one of the boxes to be photographed and seized the tractor and the trailer with its contents. The rig was then towed to a garage, and on April 2, 1979, an inventory of its contents was taken.

At the second evidentiary hearing, March 11, 1980, Richard Suello testified, often with a notable lack of clarity, on the issue of the defendants' asserted interests in the seized tractor and trailer. He testified that he had seen the tractor in question at the Partners' Garage, the defendants' place of business, on a number of occasions,

and had seen one defendant or the other move it from one place to another at the garage. Suello further testified that at or around the time in issue he had assisted the defendants in switching tractors and trailers and in moving tractor-trailer rigs, including the tractor and trailer in question here. He stated that he first saw the trailer in the yard at the Partners Garage the day after he had picked up a trailer load of meat for the defendants with his own tractor. He said after further questioning that he may have seen it there earlier in the week but not paid any attention to it because of the number of trailers in the yard. The Court also allowed Suello to testify, over objection, that one of the defendants, "[e]ither Ronald or Dennis, I don't remember which, but one of them said it was theirs." (Tr. 213)

Defendants seek suppression of the fruits of the search and seizure described above on the grounds that the search was unreasonable and violated the fourth amendment. The first question the Court must ask is "whether the complaining party possessed a fourth amendment interest impinged by the search, before considering whether the search was 'reasonable.'" The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 176 (1979). The burden of establishing this interest is on the defendant asserting it. United States v. Galante, 547 F.2d 733, 739 (2d Cir.), cert. denied, 429 U.S. 909 (1976).

> [T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant[s] which the

Fourth Amendment was designed to protect."

Rakas v. Illinois, 439 U.S. 128, 140 (1978). Thus "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place," id. at 143; Katz v. United States, 389 U.S. 347, 353 (1967), or whether "the same possession needed to establish standing is an essential element of the offense charged." United States v. Agapito, No. 79-1257, Slip Op. at 1681, 1700-01 (2d Cir., March 12, 1980), citing Jones v. United States, 362 U.S. 257, 261-63 (1960). There is no claim that the Jones "automatic standing" rule applies here, and so it is the "legitimate expectation of privacy" standard as set forth in Katz and Rakas that must

inform the Court's analysis.

> Obviously, . . . a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of Jones, 362 U.S. at 267, is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring). And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimate expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Rakas, supra, 439 U.S. at 143-44 n.12.

It is difficult to see the legitimacy of any relevant expectation

of privacy the defendants may have had in this case. The tractor had no license plate, and its serial number did not correspond to any number of record with the Connecticut Department of Motor Vehicles. The trailer bore a license plate, but the license number was registered in the name of a person with whom the defendants have failed to show they have any connection whatsoever. It is true that the defendants exercised a considerable degree of control over the vehicles; but this alone does not distinguish them from Justice Rehnquist's burglar in a summer cabin, supra. And the fact of registration of the trailer to a third party suggests that that party is the owner of the trailer, a suggestion contradicted if at all only by the hearsay assertion of one of the defendants that the trailer was his. Cf. United States v. Bruneau, 594 F.2d 1190, 1192-

93 (8th Cir. 1979) (defendant's assertion of interest in searched airplane found incredible where not shown on any ownership papers for plane or other documents). Apart from the hearsay aspect of this evidence, the Court is not impressed with the credibility of either Mr. Suello or, under the circumstances in which the statement was made, the defendant who may have asserted ownership of the trailer. The defendants offered no other evidence to suggest the tractor or the trailer. Cf. United States v. Ochs, 595 F.2d 1247, 1253 (2nd Cir.), cert. denied, 48 U.S.L.W. 3323 (1979) (defendant had no proprietary interest in searched automobile, but his "complete dominion and control" by virtue of owner's "permission to use" established possessory interest entitled to fourth amendment protection).

The fact that the trailer was

locked does no more to support the defendants' position. Suello's testimony did not reveal who locked the trailer. And even assuming it was one of the defendants, still nothing is proved -- a padlock alone only indicates an expectation of privacy, it does not implicate the "concepts of...personal property law or...understandings that are recognized and permitted by society" that form the basis for a legitimate expectation. Cf. United States v. Galante, supra, 547 F.2d at 739 ("One who conceals contraband or stolen goods on the premises of another does not thereby acquire an interest in those premises.").

The defendants having failed to establish an interest entitled to fourth amendment protection, the instant motion to suppress must be denied.

It is so ordered.

Dated at Bridgeport, Connecticut

this 3rd day of April, 1980.

T.F. Gilroy Daly /s/
T.F. Gilroy Doly
United States District Judge